IN THE

United States Court of Appeals

For the Ninth Circuit

No. 12501

MEYER SCHNEIDER,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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49

TABLE OF CONTENTS

Cases Cited

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Your petitioner, who is the appellant herein respectfully prays this Court to reconsider in certain respects its determination made on August 21, 1951, which reversed the judgment of the United States District Court for the District of Montana convicting your petitioner of a violation of Section 201, Title 18, United States Code, and directed the granting of a new trial.

The Court rendered an opinion by Biggs, Circuit Judge.

An examination of this holding discloses that the Court rejected six of the seven points raised by your petitioner, and sustained one of them, namely, one predicated upon an exception to certain language of the instructions. Several of the rejected points were of a character to necessitate the dismissal of the indictment, while others involved important rulings of a character likely to prejudice your petitioner's rights in subsequent proceedings. The purpose

of the present application is to ask the Court to reconsider the points which were not sustained and, if it should find them meritorious, to revise accordingly the decision heretofore rendered.

The omission to discuss anew points originally made on the plenary appeal is not to be construed as an abandonment by petitioner of those points.

For the reasons hereinafter to be set forth, your petitioner respectfully submits that a rehearing should be granted herein and the cause reconsidered to the end that the judgment of reversal heretofore rendered may be modified as may be just.

September 17, 1951.

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Louis M. Leibowitz,
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ARGUMENT

I

We had argued on the original appeal that neither count of the indictment was sufficient as matter of law, since they did not describe the duties or official function of the recipient of the alleged bribe, nor did they state the decision, action or matter involved. The Court rejected this contention herein and declared that the statute "does not permit the drawing of such fine distinctions of exact duties as those sought to be maintained by the defendant".

The statute, however, is one that has been criticized for ambiguity, with the result that an extremely strict construction is necessitated. In *Krichman* v. *United States* (1921) 256 U. S. 363, 65 L. Ed. 992, the Supreme Court of the United States unanimously reversed a conviction of offering a bribe to a baggage porter while a railroad was under federal control, Mr. Justice Day writing:

> "We are constrained to the conclusion that the construction given in the courts below, and insisted

upon by the government, practically recasts the statute from one embracing officials, and those discharging official functions, into one including every person discharging any sort of duty while the government is in control of the work.

"The government admits that the statute is ambiguous. While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We are unable to remedy the uncertainties of this statute by attributing to Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government."

The precision required in indictments is well exemplified by the recent holding in this very Court in *Carney* v. *United States* (1947, C. C. A. 9) 163 F. 2d 784, ruling that the amendment by the Court with consent by counsel of a portion of an indictment charging that the defendants counterfeited K-14 h gasoline ration coupons, in order to charge that defendants counterfeited A-14 h gasoline ration coupons was reversible error, since there is no authority in any court to amend or alter any part of an indictment without reassembling the grand jury; and there was accordingly a failure to prove the crime charged, notwithstanding that the misdescription was an inadvertence.

A point consistently litigated by defendant herein was that it was incumbent upon the government to prove—although it was not even sufficiently alleged in the indictment—that the person whose decision and action were sought to be influenced in his official capacity and function did actually possess an official capacity and function with respect to the subject-matter of the attempted influencing. In its efforts to establish this indispensable element of

the government's case, the prosecution introduced documentary proof that one "First Lt. Harvey D. Apperson, Jr.," or "Harvey O. Apperson, Jr." was designated "Salvage and Property Disposal Officer." Apart from everything else in the case, the proof in this fashion constituted a fatal variance with regard to what was charged in the indictment, in several significant details. To begin with, the indictment referred to Harvey B. Apperson, whereas the proof was Harvey D. Apperson, Jr., or Harvey O. Apperson, Jr., either one of whom might have been an entirely different individual. Moreover, the indictment described his position, so far as pertinent, as "United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base." The designation, however, was "Salvage and Property Disposal Officer." Inasmuch as the indictment described the Harvey B. Apperson mentioned therein as both an officer and a person acting for the United States—two distinct classes of persons (*United States* v. *Kemler* [1942], 44 F. Supp. 649, and *Shields* v. *United States* [App. D. C.], 26 F. 2d 993)—defendant was certainly entitled to be apprised of the exact capacity wherein he was allegedly acting, so that a substantial difference in the proof impels the conclusion that the government failed to sustain the allegations of the indictment, such as they were. This point was duly raised on the motion for judgment of acquittal (R. 12-13). The obviousness of the ensuing prejudice springs from a realization that if defendant had been accurately and correctly informed by virtue of proper pleading in the indictment of the exact designation of the officer, relied on through Government's Exhibit 7, purporting to establish the officer's official designation and capacity, defendant would have been in a position to litigate the issue of whether such officer actually was vested with the power to act in the subject-matter of the alleged bribe.

The indictment herein is subject to substantial criticism in that the caption of the first count is "Offer of Bribe" whereas the language of the count itself charges a promise to bribe. The opinion rendered herein failed to differentiate between these two manners of committing the offense, although it is well established that they constitute entirely different and distinguishable crimes. *United States* v. *Michaelson* (C. C. A. 2) 165 F. 2d 732. The doubt which pervaded this count by reason of the differing characterizations of the offense was duly raised below (R. 6). The resulting confusion even caused the trial judge to refer to the offense as an offer (R. 205) rather than a promise. Moreover, in *United States* v. *Kemler* (1942) 44 F. Supp. 649, the Court held that there were three distinct methods of committing the statutory offense, namely, offering, promising and giving. See also *Malatkofski* v. *United States* (C. C. A. 1, 1950) 179 F. 2d 905. Herein both this Court and the Court below appear to have ignored the allegation of promising in the indictment and referred to the case as though it involved merely an offer (opinion, p. 4).

Defendant is not accurately apprised of the offense of which he is accused when there is a patent discrepancy between the caption and the violation alleged. He cannot even at this point say with what crime he was charged or of what violation of law he was convicted. These are things which should readily be ascertainable from an inspection of the indictment, both from the standpoint of conducting an effective defense, protecting his rights with respect to double jeopardy and other considerations affecting a conviction. The indictment is susceptible of the meaning that the grand jury intended to accuse defendant of an offer of a bribe, but a grave doubt of this was introduced by its proceeding to allege a promise. Since it is not permissible to speculate as to the grand jury's meaning,

a fatal ambiguity has been introduced into the charge, in contravention of elementary requirements of criminal pleading. *Carney* v. *United States* (1947, C. C. A. 9) 163 F. 2d 784.

II

The indictment presents another major defect in the omission of any sufficient allegation of the matter supposedly pending before Apperson, adequate to enable a defendant to prepare his defense. All that the indictment has to say in this regard is "a certain matter then pending before him in his official capacity". Defendant promptly raised (R. 48) the failure of the indictment to allege either the matter that was then pending before the officer or the nature of the unlawful act defendant had attempted to induce him to do. The barest minimum requirement of an indictment for such a crime would call for an allegation or exact description of the matter pending before the officer so that, for one thing, it could be determined whether it was actually embraced within his duties or functions. The defendant is surely entitled to know from a perusal of the accusation whether the matter was something over which the officer had authority, and, in fact, whether it was actually something "then pending", as barely alleged in the indictment, rather than a matter which was already concluded—the proof indeed establishing that the only matter in Apperson's jurisdiction as to which he had dealings with defendant was a *fait accompli* with the merchandise paid for in full. The uncertainty is enhanced by the indictment's use of the words "officer and person", each of whom might have widely divergent powers and authority. The substantial character of this criticism was exemplified in the progress of the trial, the evidence showing conclusively that defendant had paid in full the price of the merchandise whose delivery the officer

was to supervise. Defendant received the merchandise and paid for it. There is no suggestion that there was any fraud or wrongdoing with respect thereto. The matter was therefore concluded. There was clearly no influencing of a decision in connection therewith, and there was nothing further pending before Apperson in an official capacity. It therefore became impossible to determine whether the new dealing was something negotiated by Apperson or of what it consisted. The proof clearly showed that the merchandise stored in warehouse 1045 was not a subject which came before Apperson in any capacity. The government completely failed to show a violation of duty with regard to the only matter actually pending before Apperson, and for which defendant came to Montana. The conviction was therefore faulty in both the failure to allege and the failure to prove, the two deficiencies concurring in such fashion as to call for a dismissal of the indictment.

III

The indictment was independently faulty in its failure to allege the duties of the officer involved. See *United States* v. *Kemler* (C. C. A. 1, 1942) 44 F. Supp. 649; also 133 F. 2d 235. In the instant case the Court held it sufficient to designate Apperson as an officer and a person acting for the United States in an official capacity. However, the indictment should have described in what capacity he was acting as such person, the duties of that particular person and by whom he was authorized to act. The Court says specifically (p. 4), "Apperson's official duties, as the indictment clearly alleges, required him to protect the government property on the base." However, the indictment can be searched in vain for any such allegation, and we believe this Court erred in reading into the indictment language which was absent therefrom. We have already argued at length in our main brief (pp. 15-22) that the

proof failed completely to show the existence of any official duty in connection with the sale or disposition of the property involved. The requirement of alleging the exact official function is well established. See *Kellerman* v. *United States* (C. C. A. 3, 1924) 295 F. 796; *United States* v. *Marcus* (C. C. A. 3, 1948) 166 F. 2d 497; *Nordgren* v. *United States* (C. C. A. 9, 1950) 181 F. 2d 718.

IV

Without prejudice to our argument that the indictment should be dismissed, we desire to point out that the Court improperly rejected our argument on the defense of entrapment. As was recently held in *Malatkofski* v. *United States* (C. C. A. 1, 1950) 179 F. 2d 905, in a *Per Curiam* opinion:

> "We held that the defendant was entitled to an instruction that if the defendant never conceived any intention of committing the offense of bribery but the officers of the government incited and lured the defendant to commit such offense 'in order to entrap, arrest, and prosecute the defendant therefor,' then the defendant should be acquitted."

Like elements existed in the case at bar, but defendant was never accorded the benefit of such instructions or rulings, to all of which exception was duly taken (R. 339, 348, 351, 352, 360-361). There was a substantial volume of proof strongly supporting the defense of entrapment. Without attempting to review it (see our main brief, pp. 31-43) we are constrained merely to mention that when Apperson was asked by the Trial Court whether Apperson's exhibition of the file was "the beginning of the plan or whatever it was", he answered, "Yes, sir. I just put this thing in front of him to see what he would do" (R. 204). This, we submit, was entrapment as matter of law, and for this Court to conclude (p. 7) "that there is no substan-

tial evidence of entrapment in the record''—even sufficient to make a jury issue—is palpably erroneous.

Petitioner therefore asks the Court to re-examine its decision to the end that the foregoing errors may be corrected and the indictment dismissed.

Respectfully submitted,

Jacob W. Friedman,
Attorney for Petitioner-Appellant.

Louis M. Leibowitz,
of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition and brief are presented in good faith, are well founded and are not interposed for delay.

Jacob W. Friedman,
Attorney for Petitioner-Appellant.